

117 Box 47 - JGR/Recess Appointments (4) – Roberts, John G.:  
Files SERIES I: Subject File

THE WHITE HOUSE

WASHINGTON

September 17, 1985

MEMORANDUM FOR M. B. OGLESBY

ASSISTANT TO THE PRESIDENT  
FOR LEGISLATIVE AFFAIRS

FROM:

RICHARD A. HAUSER <sup>Original signed by RAH</sup>  
DEPUTY COUNSEL TO THE PRESIDENT

SUBJECT:

Senator Byrd's Letter of July 30, 1985  
Concerning Recess Appointments

On July 30, 1985, Senator Robert Byrd wrote the President asking him to refrain from making recess appointments during the August recess. Senator Byrd stated that recess appointments should be limited to periods of "protracted recess" and that "any other interpretation of the Recess Appointments clause could be seen as a deliberate effort to circumvent the Constitutional responsibility of the Senate to advise and consent to such appointments". Senator Byrd's letter did not call for a response, and to our knowledge, none was sent.

Your office recently requested that we prepare a response to the above-referenced letter. A draft letter politely pointing out the deficiency of Senator Byrd's analysis of the Recess Appointments clause is attached for your signature.

cc: Larry Harlow  
FFFielding  
RAHauser  
✓ JGRoberts  
Subject  
Chron

THE WHITE HOUSE

WASHINGTON

September 17, 1985

Dear Senator Byrd:

This is in response to your letter to the President dated July 30, 1985, concerning recess appointments. A response was not prepared when your letter arrived because it did not seem to call for a response. I understand, however, that you desire a response, and so the following is offered.

Your letter stated that the recent August recess "should not...be considered the kind of extended recess contemplated by Article III [sic], Section 2, Clause 3, of the Constitution," and that "recess appointments should be limited to circumstances when the Senate, by reason of a protracted recess, is incapable of confirming a vitally needed public officer." Such limitations on the President's power, however, do not appear in the Constitution. Article II, Section 2, Clause 3 of the Constitution simply provides: "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."

The courts have rejected your suggestion that the recess appointment power was intended to be used only in rare and exceptional cases. Perhaps the clearest statement may be found in an opinion rejecting a challenge to one of former President Carter's recess appointments:

There is nothing to suggest that the Recess Appointments Clause was designed as some sort of extraordinary and lesser method of appointment, to be used only in cases of extreme necessity. ...There is no justification for implying additional restrictions not supported by the constitutional language. Recess appointments have traditionally not been made only in exceptional circumstances, but whenever Congress was not in session. Staebler v. Carter, 464 F. Supp. 585, 597 (D.D.C. 1979).

Your letter also suggests that use of the recess appointment power is somehow an improper circumvention of the advice and consent role of the Senate. We do not share this view. The power to make recess appointments is found in the Constitution, as is the Senate's advice and consent role. As the Supreme Court has stated, "The Constitution... must be regarded as

one instrument, all of whose provisions are to be deemed of equal validity." Prout v. Starr, 188 U.S. 537, 543 (1903). In no way is the provision for Senate confirmation constitutionally superior to the provision for recess appointments.

The decision to make a recess appointment is not made lightly. At the same time, however, the power to make such appointments is an important part of the system of checks and balances crafted by the Framers. The President would do a disservice to that system and the institution of the Presidency were he to acquiesce in your reading of the Recess Appointments Clause.

Sincerely,

M.B. Oglesby  
Assistant to the President  
for Legislative Affairs

The Honorable Robert C. Byrd  
United States Senate  
Washington, D.C. 20510


MBO:JGR:aea 9/17/85  
cc: FFFielding  
RAHauser  
✓JGRoberts  
Subj  
Chron

THE WHITE HOUSE

WASHINGTON

September 16, 1985

MEMORANDUM FOR RICHARD A. HAUSER

FROM: JOHN G. ROBERTS 

SUBJECT: Letter from Senator Byrd  
on Recess Appointments

Attached is a draft reply to the letter from Senator Byrd on Recess Appointments. His view has been rejected by the courts, and I think we should let the court opinions do most of the talking.

Attachment

THE WHITE HOUSE

WASHINGTON

September 16, 1985

Dear Senator Byrd:

This is written in response to your letter to the President dated July 30, 1985, concerning recess appointments. A response was not prepared when your letter arrived because it did not seem to call for a response. I understand, however, that you expect a response, and so the following is offered.

Your letter stated that the recent August recess "should not...be considered the kind of extended recess contemplated by Article III [sic], Section 2, Clause 3, of the Constitution," and that "recess appointments should be limited to circumstances when the Senate, by reason of a protracted recess, is incapable of confirming a vitally needed public officer." Such limitations on the President's power, however, do not appear in the Constitution itself. Article II, Section 2, Clause 3 of the Constitution simply provides: "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."

The courts have rejected your suggestion that the recess appointment power was intended to be used only in rare and exceptional cases. Perhaps the clearest statement may be found in an opinion rejecting a challenge to one of former President Carter's recess appointments:

There is nothing to suggest that the Recess Appointments Clause was designed as some sort of extraordinary and lesser method of appointment, to be used only in cases of extreme necessity. ...There is no justification for implying additional restrictions not supported by the constitutional language. Recess appointments have traditionally not been made only in exceptional circumstances, but whenever Congress was not in session. Staebler v. Carter, 464 F. Supp. 585, 597 (D.D.C. 1979).

Your letter also suggests that use of the recess appointment power is somehow an illegitimate circumvention of the advice and consent role of the Senate. We do not share this view. The power to make recess appointments is found in the same Constitution that accords the Senate its advice and consent

role. As the Supreme Court has stated, "The Constitution... must be regarded as one instrument, all of whose provisions are to be deemed of equal validity." Prout v. Starr, 188 U.S. 537, 543 (1903). In no way is the provision for Senate confirmation constitutionally superior to the provision for recess appointments.

The decision to make a recess appointment is not made lightly. At the same time, however, the power to make such appointments is an important part of the system of checks and balances crafted by the Framers. The President would do a disservice to that system and the institution of the Presidency were he to acquiesce in your reading of the Recess Appointments Clause.

Sincerely,

M.B. Oglesby  
Assistant to the President  
for Legislative Affairs

The Honorable Robert C. Byrd  
United States Senate  
Washington, D.C. 20510

MBO:JGR:aea 9/16/85  
bcc: FFFielding  
JGRoberts  
Subj  
Chron

United States Senate  
Office of the Democratic Leader  
Washington, D.C. 20510

July 30, 1985

The President  
The White House  
Washington, D. C. 20500

Dear Mr. President:

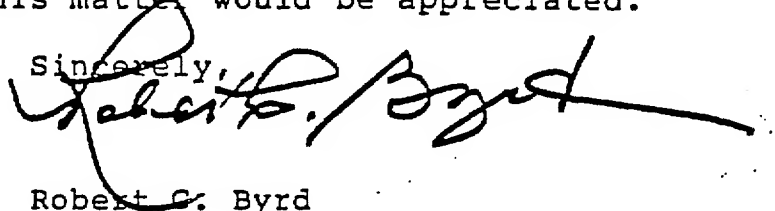
As the Congress approaches adjournment for the August break, I would like once again to convey my views, and those of the Democratic Conference, on the subject of recess appointments. This same matter was the subject of my letter to you on August 6 of last year when I expressed my deep concern about the number of recess appointments which had been made during our brief July 1984 recess.

The forthcoming August recess should not, in our judgment, be considered the kind of extended recess contemplated by Article III, Section 2, Clause 3, of the Constitution. Rather, recess appointments should be limited to circumstances when the Senate, by reason of a protracted recess, is incapable of confirming a vitally needed public officer. Any other interpretation of the Recess Appointments clause could be seen as a deliberate effort to circumvent the Constitutional responsibility of the Senate to advise and consent to such appointments.

I would therefore ask that you refrain from making any recess appointments during the August break.

Your personal attention to this matter would be appreciated.

Sincerely,

A handwritten signature in dark ink, appearing to read "Robert C. Byrd", written over a horizontal line.

Robert C. Byrd

RCB/ME



THE WHITE HOUSE

WASHINGTON

September 19, 1985

Dear Senator Byrd:

I have been asked to respond to your letter to the President dated July 30, 1985, concerning recess appointments.

In your letter, you expressed the view that the recent August recess "should not...be considered the kind of extended recess contemplated by Article III [sic], Section 2, Clause 3, of the Constitution," and that "recess appointments should be limited to circumstances when the Senate, by reason of a protracted recess, is incapable of confirming a vitally needed public officer." Such limitations on the President's power, however, do not appear in the Constitution. Article II, Section 2, Clause 3 of the Constitution simply provides: "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."

The courts have rejected the suggestion that the recess appointment power was intended to be used only in rare and exceptional cases. Perhaps the clearest statement may be found in an opinion rejecting a challenge to one of former President Carter's recess appointments:


There is nothing to suggest that the Recess Appointments Clause was designed as some sort of extraordinary and lesser method of appointment, to be used only in cases of extreme necessity. ...There is no justification for implying additional restrictions not supported by the constitutional language. Recess appointments have traditionally not been made only in exceptional circumstances, but whenever Congress was not in session. Staebler v. Carter, 464 F. Supp. 585, 597 (D.D.C. 1979).

Your letter also suggests that use of the recess appointment power is somehow an improper circumvention of the advice and consent role of the Senate. We do not share this view. The power to make recess appointments is found in the Constitution, as is the Senate's advice and consent role. As the Supreme Court has stated, "The Constitution... must be regarded as

one instrument, all of whose provisions are to be deemed of equal validity." Prout v. Starr, 188 U.S. 537, 543 (1903). In no way is the provision for Senate confirmation constitutionally superior to the provision for recess appointments.

In conclusion, the decision to make a recess appointment is not made lightly. For example, there were over ninety-seven nominations pending when the Senate recessed in August, but only seven recess appointments were made. The power to make such appointments, however, is an important part of the system of checks and balances crafted by the Framers, and the President would do a disservice to that system and the institution of the Presidency were he to acquiesce in the reading of the Recess Appointments Clause set forth in your letter.

Sincerely,



Richard A. Hauser  
Deputy Counsel to the  
President

The Honorable Robert C. Byrd  
United States Senate  
Washington, D.C. 20510

FFF:JGR:aea 9/19/85

cc: FFFielding  
RAHauser  
✓JGRoberts  
Subject  
Chron

(Elliott)  
October 8, 1985  
11:00 a.m.

# STATEMENT ON PRESIDENTIAL APPOINTMENTS

The President would like to thank Senator Robert Byrd for permitting the nomination of James Miller, Director of the Office of Management and Budget, to go forward for Senate approval in this crucial period of preparation for the fiscal 1987 budget.

At the same time, the President would like to convey his strong displeasure that thousands of key appointments, touching virtually every area of the Executive Branch, are being deliberately held up due to the apparent pique of a single Senator:

Over 8,000 mid-level career military personnel are being denied their rightful promotions and pay raises.

The Vice President will be travelling to China on October 13th; but he will not be greeted by an American Ambassador, because the President's nominee has been held up.

Senator Byrd has apparently decided to block these and other nominations because of what he terms, his "deep concern" about the number of recess appointment made last July. For the record, the President made a total of just seven recess appointments last July.

More to the point, the President's power to make recess appointments is found in the Constitution, and this issue was decided long ago. George Washington made three recess appointments between the sessions of the First Congress. President Carter made 17 direct appointments during temporary

Senate breaks, including a Cabinet member. Altogether, 15 recess appointments have been made to the United States Supreme Court.

President Reagan has never evaded the Senate's power to confirm. Every person he appointed had already been nominated before the recent Senate recess -- the Senate just hadn't acted on the nominations. And every appointee was renominated when the Senate returned.


To paraphrase Justice Holmes, a page of history is worth a volume of political rhetoric. The President respectfully requests Senator Byrd's cooperation in freeing up his nominations without further delay.

THE WHITE HOUSE

WASHINGTON

October 11, 1985

MEMORANDUM FOR RICHARD K. WILLARD  
ACTING ASSISTANT ATTORNEY GENERAL  
CIVIL DIVISION, U.S. DEPARTMENT OF JUSTICE

FROM: JOHN G. ROBERTS   
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Recess Appointments

Attached are:

1. Hauser reply to Byrd
2. White House press release of October 8
3. List of recess appointments, Johnson-Reagan  
(Johnson list may be incomplete).